



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

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MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Judicial Law Clerks
All Immigration Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 01-03:
Continued Detention Review Hearings

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I. Introduction

This Operating Policy and Procedures Memorandum (OPPM) is intended to provide guidance on the Immigration Court’s policy regarding the continued detention custody review process of aliens who are subject to final orders of removal or deportation. It has been drafted in light of the United States Supreme Court’s decision in Zadvydas v. Davis, 533 U.S. ___, 121 S. Ct. 2491 (2001) and Department of Justice regulations that have been promulgated because of that decision. 66 Fed. Reg. 56967 (2001). While much of the custody review process lies with the Immigration and Naturalization Service (Service), there are portions that impact the Immigration Court’s docket.

The post-order continued detention regulation, consistent with the Zadvydas decision, establishes four categories of aliens whose removal from the United States is not reasonably foreseeable, but whom the Attorney General may nonetheless continue to detain beyond the removal period. 8 C.F.R. § 241.14. These categories, termed “special circumstances,” include: (1) aliens with a highly contagious disease that is a threat to the public safety (8 C.F.R. § 241.14(b)); (2) aliens detained on account of serious adverse foreign policy consequences if they are released (8 C.F.R. §

241.14(c)); (3) aliens detained on account of security or terrorism concerns (8 C.F.R. § 241.14(d)); and (4) aliens determined to be specially dangerous (8 C.F.R. § 241.14(f)). Of the four aforementioned, only the fourth – those of aliens determined to be specially dangerous– require Immigration Court involvement. The other three categories will remain under the Service’s jurisdiction.

This document specifically addresses the category of cases over which the Immigration Court has jurisdiction, the basis upon which the Service will make initial determinations to continue detention, the Service’s referral of these cases to the Immigration Court, the Immigration Court’s processing and adjudication of these continued detention custody review cases, and the priority of these cases among the several types of cases over which the Immigration Court is already vested.

For specific instructions on the actual procedures and codes for use of the ANSIR system, please consult Appendices A and B of this OPPM.

II. Continued Detention Review Hearing (CDR)

A continued detention review (CDR) hearing involves a case where the Commissioner for the Immigration and Naturalization Service first certifies that the alien in question: 1) has committed one or more crimes of violence (as defined in 18 U.S.C. § 16); 2) is likely to engage in acts of violence in the future due to a mental condition or personality disorder and behavior associated with that condition or disorder; and 3) no conditions of release can reasonably be expected to assure public safety. 8 C.F.R. § 241.14 (f)(1). The certification must be based on a recommendation by a physician (after a full mental health evaluation) that the alien is likely to engage in future acts of violence due to the alien’s mental condition or personality disorder and behavior associated with that condition or disorder. 8 C.F.R. § 241.14(f)(3). Such alien is entitled to a CDR hearing.

A CDR hearing is a review proceeding which takes place before an Immigration Judge in two phases. The first phase is a reasonable cause hearing, and the second phase is the CDR merits hearing.

A. Reasonable Cause Hearing

The regulations specify that if the Commissioner determines in writing that an alien’s release would pose a special danger to the public for the reasons specified above, the Service shall initiate a two-stage review of that determination before the Immigration Court and, if appealed, before the Board of Immigration Appeals. 8 C.F.R. § 241.14 (g). The first stage is the reasonable cause hearing.

A reasonable cause hearing requires an Immigration Judge to provide a quick and preliminary evaluation of the Service’s evidence in order to determine if the Service has provided a sufficient basis to proceed with the CDR merits hearing. This reasonable cause hearing is not intended to duplicate the second phase, the more extensive and detailed hearing on the merits of the alien’s circumstances.

1. Initiating a Reasonable Cause Hearing

Jurisdiction to review the Service determination to continue to detain a removable alien because he or she is a specially dangerous individual vests with the Immigration Court when the Service files a Form I-863 (Notice of Referral to the Immigration Judge) with the court having jurisdiction over the place of the alien's custody. The Service should attach the following items to the Form I-863: 1) a written summary of the factual basis for the determination that the alien's release would create a special danger to the public; 2) copies of relevant documents used to render its decision to continue to detain the alien (including the medical or mental health examination report); 3) a written notice to the alien of the Service's intention to continue detention, with a summary of the procedures for the reasonable cause hearing; and 4) a notice to the alien of his or her rights in the proceeding. 8 C.F.R. § 241.14(g).

2. Scheduling the Hearing

The reasonable cause hearing should be scheduled immediately upon receipt of the Form I-863. However, the Court Administrator, or his or her designee, must ensure that the hearing commences no later than 10 business days after the Form I-863 is filed with the court. These hearings must take priority over all other hearings with the exception of credible fear review hearings. Reschedule other cases if necessary. For more information on the priority order for rescheduling cases, please refer to Appendix A. If the Court Administrator, or his or her designee, is unable to schedule a hearing to commence within 10 business days of the filing of the Form I-863, he or she should immediately contact his or her Assistant Chief Immigration Judge.

The Court Administrator, or his or her designee, must reject the Form I-863 charging document as improperly filed if the Service: 1) fails to indicate the type of proceeding, by marking the designated Continued Detention Review Proceedings box (Box 7); 2) fails to sign the Form I-863; or 3) fails to submit the required documentation to the Form I-863 (including mental health report). In all other cases the I-863 should be accepted for filing, even if the alien is not under a final order or the removal time has not expired. The court shall provide the parties with prompt written notice of the time and place of the hearing. Sample hearing notices are included in Appendix C.

3. Creating the Record of Proceeding

Red case folders will be used for the Record of Proceeding (ROP). As with credible fear and claimed status reviews, the Court Administrator, or his or her designee, should ensure that an ROP is created (to the maximum extent possible) within 2 hours of receipt of the Form I-863. The Court Administrator should immediately contact his or her Assistant Chief Immigration Judge if the ROP cannot be constructed during this time period. The ROP should be assembled following the standard procedures detailed in the Uniform Docketing System Manual.

4. Conducting the Hearing

The alien has the right to be represented at no cost to the government and shall be given the list of free legal service providers by the Service. The Immigration Court will provide an interpreter for the hearings. The alien shall have a reasonable opportunity to examine evidence and witnesses presented by the Service, and to present evidence on his or her own behalf. The Immigration Judge will explain these rights at the beginning of the reasonable cause hearing.

The Service has the burden to present sufficient evidence for a judge to conduct a full CDR merits hearing on its determination that detention should be continued because the alien's release would create a special danger to the public. The supplementary information accompanying the regulation in the Federal Register describes this reasonable cause hearing as "a quick evaluation by a neutral decision-maker as to whether there is a sufficient basis to proceed with the review process." The entire proceeding shall be recorded.

5. Decision

a. Oral Decisions

The oral decision must be made on the record after the parties have rested their respective cases. The oral decision must be identified as "the decision of the Immigration Judge." The regulations provide that the decision should be in summary form. Sample minute orders are attached in Appendix D.

b. Written (Reserved) Decisions

i) Reserved Decisions

All written (reserved) decisions must be issued within 5 business days after the close of the record.

ii) Extensions

The regulations also provide that the 5-day deadline may be extended: 1) by an agreement of both parties; 2) because of a delay caused by the alien; or 3) by a determination by the Chief Immigration Judge that "exceptional circumstances make it impractical to render the decision on a highly expedited basis." In any case where the 5-day deadline is extended, the Court Administrator, or his or her designee, must ensure that the proper code is entered on the completion screen for each of the three different types of extensions. CDR Completion Screen is included in Appendix E.

Approval to extend the time for issuing a written decision under the third type of extension permitted -- that of certification by the Chief Immigration Judge -- must be obtained, in writing, no later than the third business day after the hearing is concluded. The request should be forwarded via

electronic mail to both the Chief Immigration Judge and the appropriate Assistant Chief Immigration Judge, with a carbon copy (“cc”) to the Deputy Chief Immigration Judges. The request must contain the following information: 1) the alien’s name; 2) the A number; 3) the current order due date; 4) the extension time needed; and 5) an explanation stating why an extension is necessary.

If the OCIJ does not respond within one business day, the Immigration Judge should follow-up the extension request with a phone call. The Immigration Judge will be notified, in writing, of the Chief Immigration Judge’s decision regarding the extension. If the request for an extension is approved, the OCIJ will enter the appropriate new date that the decision is due, and a code indicating approval by the Chief Immigration Judge.

Because Immigration Judges are accustomed to issuing their decisions immediately upon conclusion of the hearing, it is anticipated that there will be few instances in which there will be need to invoke the “exceptional circumstances” exception to the 5-day deadline.

6. Post-Decision Procedures for Reasonable Cause Hearings

a. Service Appeal

Only the Service has the right to appeal an Immigration Judge’s determination in a reasonable cause hearing. If an Immigration Judge dismisses the CDR proceeding, the Service may appeal the dismissal to the Board. In such circumstances, the Service must file its notice of appeal to the Board within 2 business days after the Immigration Judge’s order.

b. Procedures

All ROPs will be forwarded to a designated clerk at the Board via overnight courier service immediately upon the Service reserving of appeal. The Court Administrator, or his or her designee, should maintain the tracking number invoice which will indicate the person at the Board who has received the ROP. Processing steps for CDR cases are included in Appendix A.

c. Immigration Judge Review of Transcript and Oral Decision

The Board will return the transcribed oral decision along with an informational copy of the hearing transcript to the court to obtain an original signature from the presiding Immigration Judge. The Board anticipates that these cases will be transcribed within 5 business days. The Immigration Judge will have 2 business days to review, sign and return the oral decision to the designated person at Clerk’s Office at the Board. The signed decision must then be returned to the Board via overnight courier service. If no transcript has been returned to the Board within the 2 business days, the Board will proceed with its review as if the Immigration Judge has signed the oral decision.

The “clean-up” of an oral decision must be limited to the review of the transcript for corrections in punctuation, grammar and syntax. A second effort involving either another oral

decision or the substitution of a written decision is not permitted.

d. Remands

If the Board determines that the Service met its burden, the case will be remanded to the Immigration Judge to conduct a CDR merits hearing. The Court Administrator, or his or her designee, will schedule a CDR merits hearing to commence within 30 days of the Board's order.

B. CDR Merits Hearing

The CDR merits hearing is the proceeding in which the alien will have his or her full opportunity to contest the Service's determination that continued detention is warranted. While the reasonable cause hearing was designed to give a "quick evaluation," the CDR merits hearing is an opportunity for the alien to fully examine and contest the evidence relied on by the Service and to present evidence on his or her own behalf.

1. Initiating a CDR Merits Hearing

The Immigration Court's jurisdiction vests for a CDR merits hearing after either the Immigration Court or the Board, pursuant to a final decision in a reasonable cause hearing, has determined that the Service's determination and evidence is sufficient to establish reasonable cause to proceed with a CDR merits hearing.

2. Scheduling the Hearing

The CDR merits hearing shall be scheduled "promptly" after the reasonable cause determination. 8 C.F.R. § 241.14(i). The regulations also allow the alien to request that the CDR merits hearing commence within 30 days of the reasonable cause determination. Id. As a matter of policy, and regardless of whether the alien makes such a request, the court will schedule all CDR merits hearings to commence within 30 days of the reasonable cause hearing determination. The court shall provide the parties with prompt written notice of the time and place of the CDR merits hearing.

3. Maintaining the Record of Proceeding

The ROP that was used for the reasonable cause hearing shall also be used for the CDR merits hearing. There is no requirement that the documents for the reasonable cause hearing be kept separate from those for the CDR merits hearing.

4. Conducting the Hearing

Similar to the reasonable cause hearing, the alien in a CDR merits hearing has the right to be represented at no cost to the government and shall be given the list of free legal service providers. Like all other hearings, the Immigration Court will provide an interpreter for the hearing. The alien shall have a reasonable opportunity to examine evidence and witnesses presented by the Service, and to present evidence on his or her own behalf. In addition to the written statement of rights, the Immigration Judge will explain these rights at the beginning of the CDR merits hearing. In addition to the rights available in a reasonable cause hearing, the alien in a CDR merits hearing has the right to cross examine the author of any medical or mental health reports that form the basis for the determination to continue detention.

The Service must show, by clear and convincing evidence, that the alien's release would pose a special danger to the public under the standards of 8 C.F.R. § 241.14(f)(1). As with the reasonable cause hearing, the entire CDR merits hearing shall be recorded.

5. Decision

a. Oral Decisions

The oral decision must be made on the record after the parties have rested their respective cases. The oral decision must be identified as "the decision of the Immigration Judge." Sample minute orders are attached in Appendix D.

b. Written (Reserved) Decisions

i) Reserved Decisions

All written (reserved) decisions must be issued within 10 days after the close of the record.

ii) Extensions

Approval to extend the time for issuing written (reserved) decisions must be obtained from the Chief Immigration Judge pursuant to the same procedures discussed in part II, § A(5)(b)(ii) of this OPM.

6. Post-Decision Procedures for CDR Merits Hearings

a. Appeals

Both parties have the right to appeal an Immigration Judge's decision in a CDR merits hearing in accordance with 8 C.F.R. § 3.38(b). If the Immigration Judge dismisses the proceedings, the Service shall have 5 business days from the date of the Immigration Judge's decision to file a notice of appeal with the Board.

b. Procedures

In order to ensure that the Board has the full period in which to adjudicate the appeal, upon either party's reserving of it, the Court Administrator, or his or her designee, will forward all ROPs in the matter to a designated clerk at the Board via overnight courier service. The Court Administrator, or his or her designee, should maintain the tracking invoice which will indicate the signatory at the Board. Processing steps for CDR cases are included in Appendix A.

c. Immigration Judge Review of Transcript and Oral Decision

The Board will return the transcribed oral decision along with an informational copy of the hearing transcript to the court to obtain an original signature from the presiding Immigration Judge. The Immigration Judge will have 2 business days to review, sign and return the oral decision to the designated person at Clerk's Office at the Board. The signed decision must be returned to the Board via overnight courier service. If no transcript has been returned to the Board within 2 business days, the Board will proceed with its review as if the Immigration Judge signed the oral decision.

The "clean-up" of a oral decision must be limited to the review of the transcript for corrections in punctuation, grammar and syntax. A second effort involving either another oral decision or the substitution of a written decision is not permitted.

d. Remands

If the Board remands a CDR merits case to the Immigration Court, the Court Administrator, or his or her designee, will schedule the CDR merits hearing to commence within 30 days of the Board's order.

III. Motions to Set Aside Decision

A. Initial Review by the Service

Once there has been a finding that special circumstances exist justifying an alien's continued detention, the alien can request, no earlier than 6 months from the date of the last decision by the Immigration Judge (or the Board, if appealed), a review of his or her custody status based upon a material change in circumstances so that the alien's release would no longer pose a special danger to the public. 8 C.F.R. § 241.14 (k). The alien must first make such a request to the Service. 8 C.F.R. § 241.14(k)(2).

B. Motion Before the Immigration Court

If the Service denies the alien's request for release from custody, the alien has the right to file a Motion to Set Aside Decision with the Immigration Court having jurisdiction over the continued custody review. 8 C.F.R. § 241.14(k)(6). The alien will have the burden to establish that there has

file a Motion to Set Aside Decision with the Immigration Court having jurisdiction over the continued custody review. 8 C.F.R. § 241.14(k)(6). The alien will have the burden to establish that there has been a material change in circumstances so that his or her release would no longer pose a special danger to the public. 8 C.F.R. § 241.14(k)(4). The regulations do not require a filing fee for this motion.

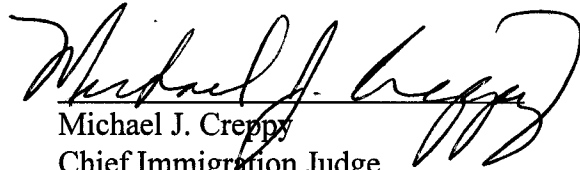
1. Grant of the Motion

If the Immigration Judge determines that the alien has met his or her burden, the Immigration Judge shall set aside the determination in the previous continued detention review proceeding and schedule a new CDR merits hearing. The Court Administrator, or his or her designee, must schedule the hearing to commence within 30 days of the granting of the motion to set aside decision.

2. Denial of the Motion, Appeals and Remands

If the Immigration Judge denies the motion, the alien can appeal the decision to the Board. 8 C.F.R. § 241.14(k)(6)(iii). If the Board remands the decision, the Court Administrator, or his or her designee, must schedule the hearing to commence within 30 days of the Board's order.

If you have any questions regarding this OPPM, please contact my Counsel at (703) 305-1728.


Michael J. Creppy
Chief Immigration Judge

Appendices